until today at 8% per annum and the plaintiff do receive 70% of this amount in satisfaction of his pre-judgment interest. As from today interest will run on the decretal amount of $1,600 at 8% per annum till realisation. Section 11 of the Civil Law Act does not permit the granting of interest upon interest.

As to costs Mr. Pillay submitted that it should be on the Magistrate's Court's scale since if the plaintiff had made proper enquiries as to the measure of damages which could be awarded he should have been fully cognizant that the matter was within the jurisdiction of the Magistrate's Court. Mr. Subra Naicker, however, pointed out that when this action was filed it included a claim for specific performance which was not within the jurisdiction of the Subordinate Courts. When the case came on for trial a claim for specific performance was included and the arrangement between the parties to accept damages instead was only reached in the course of the action. It seems to me that the proper approach which the Court should take in such matters is not to be influenced merely by the size of the decretal amount but also to look to whether there were good grounds for the action to be filed in the High Court. In this case I think that the plaintiff was justified in filing his action here even though the delay in prosecuting the action calls for considerable criticism.

Happily counsel for both parties agreed to leave it to the Court to fix a lump sum by way of costs of this action and in the exercise of my discretion I order that a sum of $1,800 be paid to the plaintiff in full satisfaction of his party and party costs such sum to include all disbursements and the valuer's fee.

Judgment is therefore granted in favour of the plaintiff accordingly.

Claim allowed.

Solicitors: *Subra Naicker & Co.; C.K.G. Pillay & Co.*

GISELA GERTRUD ABE v. TAN WEE KIAT

[O.C.J. (Siti Norma Yaakob J.) April 29, 1985]

[Kuala Lumpur – Divorce Petition No. 157 of 1977]

Family Law – Maintenance – Application to vary maintenance order – Change in circumstances – Law Reform (Marriage and Divorce) Act, 1976, s. 83.

In this case the petitioner had obtained a divorce in 1979 from the respondent and it was ordered that the respondent should pay a monthly payment of $1,500 to the petitioner as maintenance for herself and the two children of the marriage. At that time the respondent was earning a salary of $5,000 a month. However, between June 1983 to January 1984 he was out of employment. In January 1984 he obtained a temporary appointment at a salary of $3,000 a month. He also had to incur debts to pay the judgment debt to the petitioner. Of his children, the eldest daughter was 22 years old in April 1985 and the youngest daughter would attain 18 years in May 1985. The petitioner was the owner of a house and was the director of her own company. She claimed that she needed $6,500 for the personal expenditure of herself and her two children who are studying in England.

For the period June 6, 1983 until January 6, 1984, when the respondent was not gainfully employed, he was in arrears of seven months' maintenance totalling $10,500. He applied: (1) to vacate the maintenance order made against him on May 4, 1979 for the period June 6, 1983 to January 6, 1984, and (2) to vary the amount of such maintenance order after January 6, 1984.

Held: (1) there had been a material change in the financial standing of the respondent during the period when he was out of a job and this rendered it unjust to expect him to continue to be bound by the maintenance order made against him in 1979. The maintenance order made against him is therefore rescinded for the period June 6, 1983 to January 6, 1984;

(2) the respondent's legal responsibility to maintain the elder of the children ended when she became 18 on December 1980 and that of the younger daughter will end on May 31, 1985 when she, too, will celebrate her eighteen birthday;

(3) from January 1984 until May 31, 1985 the respondent is legally responsible for maintaining only the petitioner and the younger of the two children and having due regard to the respondent's liabilities, his sources of income and the petitioner's financial standing, $800 will not be an unreasonable sum to expect from the respondent by way of maintenance;

(4) on the 2nd daughter attaining her eighteenth birthday this sum of $800 will be further reduced to $400 per month.

CIVIL SUIT.

Kingston T.K. Tan for the respondent/applicant.

S. Sivasubramanian for the petitioner/respondent.

Cur. Adv. Vult.

Siti Norma Yaakob J. : On March 24, Mohamed Azmi J. as he then was decreed that the marriage between the petitioner and the respondent in these proceedings be dissolved and following this, on May 4, 1979, Anuar J., ordered that with effect from January 1, 1979, the respondent make monthly payments of $1,500 to the petitioner as maintenance for herself and the two children of the marriage, custody of whom was subsequently given to the petitioner.

Subsequent to this maintenance order, when the respondent defaulted in arrears of maintenance, the petitioner (on September 23, 1979), obtained a court order attaching the respondent's earnings due to him from his employers, Conzinc Riotinto Malaysia Sdn. Bhd. This order remained good until May 31, 1983 when he was retrenched by his employers. For six months after that he was unemployed until January 1, 1984 when he secured employment with Malayan United Management Sdn. Bhd. and on April 5, 1984, the petitioner obtained another attachment order attaching the respondent's earnings due to him from his new employers and to date, payment of the maintenance due to the petitioner is affected by this attachment order.

For the period June 6, 1983 until January 6, 1984, when the respondent was not gainfully employed, he was in arrears of seven months' maintenance totalling $10,500 and he now applies

(1) to vacate the maintenance order made against him on May 4, 1979 for the period June 6, 1983 to January 6, 1984, and

(2) to vary the amount of such maintenance order after January 6, 1984.

This application is made under section 83 of the Law Reform (Marriage and Divorce) Act 1976 where jurisdiction is given to the Court to vary or rescind any subsisting order for maintenance "where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances" of the person against whom the order was made. The respondent relies on the second limb of the section that his financial position has materially changed since June, 1983 as to prevent him from meeting his legal obligation under the maintenance order.

It is not disputed that in 1979 he was earning a salary of $5,000 a month and that between June, 1983 to January 1984, he was out of employment and evidence was led to show that during this period of time, he had to shoulder the following liabilities in addition to meeting payment of the maintenance order.

(1) He had to discharge a loan which he obtained from United Asian Bank, the collateral for which was provided by the petitioner in the form of her house known as No. 3 Jalan Tebu, Ukay Heights, Kuala Lumpur. Initially all instalment payments due on the loan were paid for by the petitioner but when she was advised that the respondent was the principal debtor, she stopped payments altogether and the respondent was forced to meet the outstanding balance of the loan plus accrued interest which amounted to well over $124,000. As he was threatened with bankruptcy by the Bank, he borrowed money from his mother to settle this loan and this is evidenced by an I.O.U. chit executed in favour of his mother and his mother's bank statement also showed the amount as having been paid to United Asian Bank.

(2) He also borrowed other sums of money from his mother and sister to meet payments for

(i) taxed costs of his divorce petition amounting to $8,414.62¢ ;

(ii) settlement of a judgment sum due to the petitioner amounting to $2,469.67¢ ;

(iii) legal fees due to Messrs. Sundra & Low amounting to $10,415.27¢; and

(iv) the deposit for the seven months arrears of maintenance.

All these payments are either supported by documentary proof or in any event not disputed and I have no reason to doubt that the respondent had made such payments.

His only asset then was the 302/917 undivided share of a farm land in Beranang over which the petitioner had obtained a writ of seizure and sale to ensure payment of the seven months' arrears of maintenance but she lifted the attachment when the respondent deposited the arrears of maintenance with her solicitors. Apart from this farm land for which no evidence was shown that it was income producing, the respondent had some savings in the form of warrants from Consolidated Plantations Berhad which he had deposited with Malayan Banking Berhad to secure overdraft facilities. When the respondent failed to realize these warrants, the

Bank converted them into shares and had the shares sold and part of the proceeds of sale was utilized by the Bank to offset outstanding sums due on the overdraft facilities and the balance of $30,000 was used by the respondent to repay part of the large amount he borrowed from his mother. Apart from the farmland and warrants, the respondent has no other source of income and he depends largely on his second wife (he has since remarried) for financial support as she runs a Ballet School and assists in her sister's jewellery business and is therefore able to supplement the family budget.

That was the financial position of the respondent during the period June 1983 to January 1984 and I have now to determine whether on the facts disclosed there has been any material change as to amount in law a change in circumstances to warrant my making the order asked for. Having considered the evidence throughly and there is no evidence to suggest that the respondent has been in any way extravagant, I am satisfied that he had undergone a material change in his financial standing as to render it unjust by reason of such change to expect him to continue to be bound by the maintenance order made against him in 1979. On that finding, the respondent succeeds in his first prayer and I accordingly rescind the maintenance order made against him in 1979 for the period June 6 to January 6, 1984.

Having decided that, has his financial standing improved since then as to warrant him applying to have the quantum of maintenance reduced from January 1984? In January 1984, the respondent secured a temporary appointment with Malaya United Management Sdn. Bhd. and now earns a salary of $3,000 per month but after deducting his contribution towards his Employers' Provident Fund, he is left with a net sum of $2,730. However, in 1984, he incurred further indebtedness as he had to settle a judgment sum of over $70,000 to the petitioner, the amount that she had paid on his behalf on the loan he obtained from United Asian Bank. Added to this, he still owes his mother and sister about $190,000 for sums that were loaned to him from time to time. Apart from his salary and the farm land, he is the co-owner of the house No. 8 Jalan Aman, Kuala Lumpur, where he now resides with his second wife and her three children from her previous marriage. The other co-owner of the house is his wife but the property is charged to Malayan Banking Berhad for which the respondent has to pay a monthly instalment of $2,761. There is evidence to show that he had been in arrears of such instalments from August to December, 1984, but he has since settled the arrears totalling $13,805 from some insurance money due to his wife on an endowment policy. He has been trying, since December 1984, to have the house rented out for $3,000 a month but up to date he has not been successful and this may well be due to the sluggish property market prevailing now.

Turning now to the petitioner's financial position, she is the owner of the house at No. 3, Jalan Tebu, Ukay Heights, Kuala Lumpur, which was at one time charged to United Asian Bank but has since been discharged by the respondent. She now rents the house to an Italian diplomat for $2,800 per month. She had testified that before renting the premises to the diplomat, she had incurred expenses in effecting extensive renovations to the house that enabled her to raise the rental from $2,400 to $2,800. Quite apart from the rentals, the property itself is situated in one of the choicest residential areas in Kuala Lumpur and should she decide to sell it, I feel pretty certain that she would get a handsome price for it.

She lives in rented premises and she calculates her monthly personal expenditure together with that of her two children who are presently studying in England at $6,500 and although her sources of income fall short of this amount by $2,200, she has been able to manage somehow with assistance from her own family and friends. She is also a director of her own company, Tanabe (Holdings) Sdn. Bhd., conducting business as agents and representing the interests of German and Austrian companies in Malaysia. She admits that for the last three years, the company had incurred losses but all the same she is not prepared to give up her business as she considers that the services she offers have great potential and that the losses incurred so far are only a temporary set-back.

This brings me to consider the position of the two children of the marriage and their entitlement to be maintained by their father, the respondent. The petitioner feels very strongly that she is duty bound to provide them with the best education which they are now receiving in England and she maintains that the respondent is morally bound to maintain them whilst they are there. The elder of the two girls is now 22 and the younger will be 18 next month. Under section 95 of the Law Reform (Marriage and Divorce Act) 1976, the duration of a maintenance order made in favour of a child

expires, in the absence of any expressed shorter period, on the child attaining the age of 18 years. Reading this section, it is clear that it is a mandatory provision and that being the case, I consider that consideration of moral grounds is of no relevance whatsoever. To that end then the respondent's legal responsibility to maintain the elder of the two children ended when she became 18 on December 8, 1980 and that of the younger daughter will end on May 31, 1985 when she too celebrates her eighteenth birthday. The practical effect of this is that as far as the elder daughter is concerned, the amount of maintenance which have already been paid since December 8, 1980 should have been reduced when she became 18 on that day as after that date the respondent is only legally obliged to maintain the petitioner and the younger of his two daughters until she too reaches 18 next month. That being the case, there would be some remittance due to the respondent of the maintenance he had already made for the elder daughter since December 8, 1980, but as the respondent is not seeking a refund of such remittances, I am loathe to consider it anyway.

Thus, from January 1984 until May 31, 1985, I hold that the respondent is only legally responsible for maintaining only the petitioner and the younger of the two children and having due regard to the respondent's liabilities, his sources of income and the petitioner's financial standing, I consider that $800 will not be an unreasonable sum to expect from the respondent by way of maintenance and accordingly I vary the amount of maintenance from $1,500 to $800 effective from January 6, 1984. On the second daughter attaining her eighteenth birthday next month, this sum of $800 is to be further reduced as the number of persons legally entitled to be maintained by the respondent will be reduced to one, the petitioner herself, and based on similar considerations of the financial positions of both the petitioner and the respondent, I reduce the amount of maintenance to $400 and with effect from June 1, 1985, the amount of maintenance to be paid by the respondent to the petitioner shall be reduced from $800 to $400 per month and to that extent, the maintenance order of May 4, 1979 is further varied. As the respondent's salary had been attached to the extent of $1,500 per month, there will be readjustments to be made based on the reduced amounts of maintenance and I leave this to counsel for both parties to calculate such readjustments. Lastly, as no costs were pleaded in these proceedings, I make no order for costs on this application and accordingly each party is to bear his or her own costs.

Order accordingly.

Solicitors: *Abdul Aziz Ong & Co.; Clough, Thuraisingham, Sivasubramanian & Ramdas.*

SOO WAI SENG v. TAN KIM LOCK

[O.C.J. (Eusoff Chin J.) May 28, 1985]

[Kuala Lumpur – Civil Suit No. 307 of 1980]

Road Traffic – Motor accident – Plaintiff knocked down while trying to cross highway – Road divider with fence to prevent people crossing – Rainy night – Defendant not liable.

Damages – Quantum – Multiple injuries.

The plaintiff was knocked down by the defendant's car as he was attempting to cross the Kelang/Kuala Lumpur Federal Highway on a rainy night. Each side of the highway was 45 feet wide with 4 lanes. There was a centre road divider with a fence of about two to three feet high erected along the divider. This was erected to prevent people from crossing the highway. The defendant had been using this stretch of the highway daily and had never before seen anyone crossing the road there. He first saw the plaintiff when the plaintiff was about eight feet ahead of him in the act of crossing the road. He could not reverse to the right because of the road divider, nor to the left because there were other vehicles. Consequently, the plaintiff was knocked down and suffered multiple injuries.

Held, dismissing the plaintiff's claim: (1) on the facts, the defendant was not liable in any way to causing the accident;

(2) but had the plaintiff succeeded in his claim, on a 100% liability on the part of the defendant, the following damages would have been assessed for the plaintiff:-

Special Damages: hospital charges: $1,030; other expenses: $143; loss of earnings for the period one year and two months when he was unable to work: $2,940;

General Damages: fracture of right femur: $5,000; fracture of both tibia and fibula: $7,500; fracture of superior and inferior ramus: $6,500; lacerations and abrasions to left forearm, right chest and parietal region: $2,500. The total assessment for pain and suffering and loss of amenities for the injuries received would come to $21,500. But since there is overlapping, it is scaled down to $19,000.

Cases referred to:

(1) *Samar bt. Mansor* v. *Mustafa Kamarul Ariffin* [1974] 2 M.L.J. 71.